No. 10740

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HUGH WILTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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Introductory Statement Concerning Questions Involved.

This is an appeal from a judgment of conviction under six counts of an Information which charged a violation of a Rent Regulation for Housing. The defendant was sentenced to a fine of $500.00 and to 90 days in jail on Count 1. The case was tried before the Honorable Leon R. Yankwich and a jury.

Each count of the Information was similar in charging that the defendant for a certain period of time in the latter part of 1943, knowingly, *wilfully* and unlawfully received rent for housing accommodations consisting of an apartment described only by number and street address within the Los Angeles Defense Rental Area, which apartment unit at the times mentioned had a maximum rent less than the amount received under "Rent Regulation for

Housing (8 Fed. Reg. 7322), issued by the Administrator of the Office of Price Administration, pursuant to Section 2 of the Emergency Price Control Act of 1942."

The conviction was under the following counts:

Count 1, which charged the receipt from Mr. and Mrs. Edgar M. Mathews of rent in the amount of $20.00 as *two weeks* rent for the period September 28th to October 12th, 1943, for the housing accommodations consisting of **apartment 16** in the apartment building at 441 North Figueroa Street, Los Angeles, California, which apartment unit at all times mentioned had a maximum rent for said period of $8.00 under the above mentioned rent regulations.

Count 3, which charged the receipt from Mr. and Mrs. Claude W. Hoffman of rent in the amount of $20.00 as *two weeks* rent for the period December 1st to December 15th, 1943, for the housing accommodations consisting of **apartment 10** at 44 North Figueroa Street, Los Angeles, California, which apartment unit at all times mentioned had a maximum rent for said period of $10.00 under the above mentioned rent regulations.

Count 4, which charged the receipt from Mr. and Mrs. H. G. Yost of rent in the amount of $20.00 as *two weeks* rent for the period December 18th to December 25th, 1943, for the housing accommodations consisting of **apartment 11**, at 441 North Figueroa Street, Los Angeles, California, which apartment unit at all times mentioned had a maximum rent for said period of $4.50 under the above mentioned rent regulations.

Count 5, which charged the receipt from Mr. and Mrs. Mike Green in the amount of $10.00 as *one week's* rent for the period from Dec. 11, 1943, to Dec. 18, 1943, for

the housing accommodations consisting of **apartment 3** at 435 North Figueroa Street, Los Angeles, California, which apartment unit at all times mentioned had a maximum rent for said period of $3.75 under the above mentioned rent regulations.

Count 6, which charged the receipt from Mr. John Doe Bower and Mrs. Georgia Bower in the amount of $10.00 as *one week's* rent for the period December 5th to December 12th, 1943, for the housing accommodations consisting of **apartment 4,** at 435 North Figueroa Street, Los Angeles, California, which apartment unit at all times mentioned had a maximum rent for said period of $4.38 under the above mentioned rent regulations.

Count 7, which charged the receipt from Mr. John Doe Bower and Mrs. Georgia Bower in the amount of $10.00 as *one week's* rent for the period December 12th to December 19th, 1943, for the housing accommodations consisting of **apartment 4,** at 435 North Figueroa Street, Los Angeles, California, which apartment unit at all times mentioned had a maximum rent for said period of $4.38 under the above mentioned rent regulations.

The particular rent regulation which these counts charge was violated is not otherwise described in the Information than by the parenthetical references to the Federal Register, and no evidence was offered as to the provisions of the regulation, its manner of issuance, or the length of time after issuance it was in force.

The regulation itself was not introduced in evidence, nor was the jury informed as to its provisions.

An examination of 8 Fed. Reg. page 7334 will show that a Rent Regulation for Hotels and Rooming Houses

was published on the same day as the regulation referred to in the information.

An examination of the Rent Regulation for Housing, 8 Fed. Reg. 7322, Section 1(b) "Housing to which this regulation does not apply," subdivision 3, which reads, "Rooms or other housing accommmodations within hotels or rooming houses or housing accommodations which have been *with the consent* of the administrator brought under the control of the rent regulation for hotels and rooming houses pursuant to the provisions of that regulation" would seem to indicate the necessity, in connection with property such as the one here involved, of proof that the consent of the administrator to bring the property under the Rent Regulation for Hotels and Rooming Houses had not been given. No such evidence, however, was introduced.

An examination of the last mentioned regulation applying to rooming houses, Schedule A shows that the date by which the registration statement was required to be filed was December 16th, 1942. The effective date of the regulation was November 1st, 1942, and the maximum rent date, March 1st, 1942. These dates are the same as those provided in the rent regulation for housing.

Although the jury was not advised, nor did the trial court consider the subject, Section 5 of the regulation for housing provides that the administrator may change maximum rents under circumstances which are enumerated. The adjustment, according to this section, shall be the amount the administrator finds to have been, on the maximum rent date, the difference in the rental value of the housing accommodations by reason of the change.

The circumstances under which the administrator is required to make a change, as provided in this section, are

(1) In those cases involving a major capital improvement;

(2) An increase or decrease in the furniture, furnishings or equipment;

(3) An increase or decrease of service;

(4) An increase or decrease in the number of sub-tenants or other occupants.

Section 5 further provides that the adjustment shall be on the basis of the rent which the administrator finds was generally prevalent in the defense rental area on comparable housing accommodations on the maximum rent date. Although under paragraph (a) of Section 5 the landlord is given the privilege of filing a petition for adjustment by way of increase in the maximum rent, *there is nothing in the regulation which prevents the administrator from consenting to an adjustment without a petition.* This subject becomes of great importance in connection with certain comments of the court made during the trial of this case.

The statute under which the regulation is alleged by the government to have been issued is not a statute which penalizes conduct which violates the regulation, unless the violation is wilful.

Section 2 of 56 Stat. 23, paragraph (b) provides that whenever in the judgment of the administrator, in order to effectuate the purposes of the act, it is necessary, the administrator shall issue a declaration setting forth the necessity for, and the recommendation with reference to the stabilization of rents for a defense area; that if within

sixty days rents within the defense area have not been stabilized in accordance with the recommendations, the administrator may then by regulation or order establish such maximum rent or rents for such accommodations as in his judgment will be generally fair and equitable. By paragraph (c) the administrator is given a broad discretion as to the form and manner of any regulation.

Section 4 provides that it shall be unlawful to demand or receive any rent for any defense area housing accommodations in *violation of any order or regulation under* Section 2 or of any price schedule effective in accordance with the provisions of Section 206 or any regulation under Section 202(b) or 205(f).

Section 206 refers to schedules established prior to the date under which the price administrator took office.

Section 202(b) has reference to regulations requiring the furnishing of information and the keeping of records.

Section 205(f) is a part of the statute entitled "Enforcement" and makes provision for certain regulations where licenses are required.

Under this title of "Enforcement" Section 205 provides in paragraph (a) for the issuance of an injunction and in paragraph (b) that any person who wilfully violates any provision of Section 4 of the act (which is the section stating certain acts are unlawful) and is placed under a general heading "Prohibitions," shall upon conviction be subject to a fine of not more than $5,000.00 nor to imprisonment of not more than 2 years in the case of a violation of Section 4(c) violation by officials and for not more than one year in all other cases, or to both such fine and imprisonment.

The fine in this case evidently was imposed under Section 205, paragraph 6.

Paragraph (d) of Section 205 provides:

> "No person shall be held liable for damages or penalties in any Federal, State or Territorial court on any grounds for or in respect of anything done or admitted to be done in *good faith* pursuant to any provisions of this act or any regulations, order, price schedule requirement or agreement thereunder or under any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administrator and Civilian Supply, notwithstanding that subsequently such provisions, regulation, order, price schedule requirement or agreement may be modified, rescinded or determined to be invalid." (Italics ours.)

We have referred to these various provisions of the act to show how interrelated, how complicated and how technical they are, for which reason, no doubt, it is the clear intent of the statute not to punish a violation unless the violation was in bad faith. In short, it will be our contention that evidence of attempted compliance with the provisions of the act showing good faith, is sufficient to prevent a conviction. The government must very definitely prove the violation was wilful before the conviction can be upheld. Charges for accommodations made in this case were not in violation of the Regulation for Hotels and Rooming Houses (if there was any violation at all) and the number of forms filed with the Office of Price Administration and apparently accepted by that office and the number of conferences there together with

the stamp on the registration filed under the other regulation *"Must Be Registered Again"* (Exhibits 1 and 2) is evidence of good faith. The instructions to the jury did not give the defendant the benefit of this provision.

We shall show:

1. Prejudicial error in instructions which did not state the law which governs this case.

2. The evidence does not support the conviction.

The Evidence.

The government called a former manager, Madge Bentley, who testified that the rental on apartment 16 (Count 1) on March 1st, 1942, was $16.00 *per month* and that at the time the apartment was unfurnished [R. p. 52]; that the rental on apartment 10 (Count 3) on the 1st day of March, 1942, was $20.00 *per month.* "It was partially furnished, I believe." That the rental on apartment 11 (Count 4) on the 1st day of March, 1942, was $18.00 *per month;* it was partially furnished. That the rental on apartment 4 (Counts 6 and 7) on the 1st day of March, 1942, was $17.50 *a month;* it was rented furnished. That the rental on apartment 3 (Count 5) on March 1, 1942, was $15.00 *a month;* it was partly furnished.

While this witness was testifying the court unnecessarily and outside of the issues brought out to the prejudice of the defendant that the apartment was in a working persons' neighborhood and accommodated the poorer class of people [R. p. 54].

That in apartment 10 there were perhaps a table, a dresser and a kitchen chair; that in apartment 11 there were a dresser, a dressing table, a table and two chairs; that in apartment 3 there were a couple of dressers, just

a small amount of furniture; in apartment 4 there were a chair, table, dresser, bed, stove and curtains.

This witness did not describe the number of rooms in the respective apartments *nor did this witness give any evidence to show that the apartments referred to by this witness were the same* as to their rooming accommodations with the apartments for which witnesses testified they paid rent in excess of the maximum.

In support of the receipt of payments of rent in excess of the maximum, the government offered the following testimony:

As to Count 1, Mrs. Mathews testified [R. pp. 57-60] that she lived in apartment 16 and that she paid $20.00 to Mr. Wilton referred to in the government's Exhibit 6 which is a receipt for $20.00 but does not show the application of the payment, i.e., whether it was for rent or something else. She testified that she *supposed* this payment was for rent. "Our rent was paid way in the future at that time." "I paid the money to apply as rent on the place." "When I took the apartment I was told that the rent was $10.00. There were a few pieces of furniture. A bed, a chair or two, a table and a broken down case. There were two rooms with the kitchen and bath. One sleeping room. [R. p. 57.]

On cross-examination this witness testified she did not have to pay any rent; that she did not owe Mr. Wilton any rent and she couldn't say what the last rent paid was [R. p. 59]. She also testified that when she moved in there was a dressser and there were three dressers when she left [R. p. 60].

Assuming that the evidence showed that the maximum rental for the apartment occupied by Mrs. Mathews was

$8.00 for the two weeks, Sept. 28th, 1943, to Oct. 12th, 1943, as charged in the information, this witness did not testify that the $20.00 which she paid to Mr. Wilton was for the period of time, Sept. 28th, 1943, to Oct. 12, 1943, or for any two weeks' period. According to this witness the sum of twenty dollars was paid "to apply as rent on the place," and as a result of the payment "Our rent was paid way in the future *at that time.*"

There is in connection with Count 1, as well as in connection with all the other counts, the question whether a monthly rental on March 1, 1942, establishes a maximum rental of the same accommodations when rented semi-monthly or on a weekly basis.

Furthermore, as to apartment 16 we are left entirely without evidence as to whether this apartment when rented on March 1, 1942, had the same number of rooms as when rented to Mrs. Mathews. The rent on March 1, 1942, according to Madge Bentley was for an unfurnished apartment, but the rent, regardless of the period of time covered, as paid by Mrs. Mathews was for a furnished apartment. This was not the same housing accommodations as rented on March 1, 1942.

As to Count 3, Claude W. Hoffman testified that he lived in apartment 10 with a wife and two children. The apartment had a kitchen, dining room, bedroom and bath; that the government's Exhibit 7 for a total of $25.05 included two items of $10.00 each respectively for rent from December 1st to December 8th, 1943, and from December 8th to December 15th, 1943; that the apartment was partially furnished; that the amount of $23.21 included the rent referred to and moving charge of $3.21, paid to Mr. Wilton. He did not explain the item of $1.84 for gas.

The government's Exhibit 7 shows the following:

> "Rate O. P. A. Reg. 4 people $10.50. Gas & Elect. will be paid by tenant above Min. 1.35 Rental Agreement to be signed later."

As to Count 4 Mrs. Mary Yost testified that she lived at apartment 14, with her husband and *three children,* the apartment consisting of a living room, dining room, bath and kitchen and two in-a-door beds and that she occupied this apartment in December, 1943; that Mr. Wilton in a certain conversation said he was "charging $10.00 a week for the rooms or for the apartment which wasn't wholly furnished." [R. p. 63.]

With reference to the government's Exhibit 8, which does not designate what apartment the receipt covers, this witness testified that she paid the week's rent shown in the receipt for apartment No. 12. There is *no evidence* that the defendant received more than the maximum rent for apartment 11. This witness did not mention apartment 11.

As to Count 5 Mrs. Louise Green testified that she lived at 435 North Figueroa Street for the period from December 11th to December 18th, 1943; she did not designate the apartment in which she lived and for which she paid rent either by number or by description, except that it consisted of a living room, dining room, bathroom and kitchen and two wall beds. Whether the rent paid by Mrs. Green was for apartment #3 during the period in which it is charged more than the maximum rent was paid is left wholly to conjecture. The government's receipt Exhibit 9 for $15.00 does not indicate the apartment covered by the receipt. Mrs. Green testified she paid rent to Mr. Wilton of $10.00 a week. She was not even certain of this for she also said

"I don't know whether I paid it to Mr. Wilton or to Mr. Fenkell." Mr. Fenkell was never identified.

Counts 6 and 7 are for amounts received from Mr. and Mrs. Bowers in excess of the maximum for apartment 4 covering respectively the periods December 5th to December 12th, and December 12th to December 19th, 1943. Mrs. Georgia Bowers testified that she lived with her husband and *two children* at 435 North Figueroa, and that the apartment consisted of two rooms, bath and kitchen; that the apartment had a kitchen, a living room and a bedroom; that Mr. Wilton told her the rent was $10.00 a week, which she paid. She testified Exhibit 10 was a rent receipt and that she paid the amount shown by the receipt. Exhibit 11 was another rent receipt but these receipts covered rents from December 5th to December 19th, 1943; that she had some furniture in the kitchen and in the living room. This witness did not testify as to the particular apartment for which the rent was paid.

In addition to the foregoing testimony, the government called Gladys Iliff, an employee of the Office of Price Administration, who was the supervisor of registration in rent control, employed there since November, 1942, and who had charge of the files in the area rent office. This witness identified government's Exhibits 1 and 2 for identification, which were subsequently admitted.

These exhibits consist of six registrations of the apartments. At best they only indicate the maximum rent was as testified to by Madge Bentley, namely apartment 16 (Count 1) $16.00 per month; apartment 10 (Count 3) $20.00 per month; apartment 11 (Count 4) $18.00 per

month; apartment 4 (Count 6) $17.50 per month; apartment 3 (Count 5) $15.00 per month. The rent on any basis other than a monthly basis is not indicated. The number of rooms in each apartment is not indicated.

On cross-examination Mrs. Iliff was asked to explain the stamp on Exhibits 1 and 2 as to re-registration. Her testimony was contradictory and confusing. She did not know who put the stamp there. She said, "At some time and place there was a re-registration of some sort. It was brought before me for approval and it was not granted." She told of an investigation apparently following the filing of registration forms under the Regulation for Hotels, etc.

Georgia Burns was called by the government. She testified that in September, 1943, she received from the defendant a form with respect to "A proposal to register certain property as a rooming house." She identified and there was introduced in evidence, government's Exhibits 4 and 5. These exhibits are in the form apparently adopted for hotels and rooming houses under the Regulations with reference to the same found in 8 Fed. Reg. page 7334. The rates for the rooms referred to depend in part upon the number of persons occupying the same. Roooms 21, 24, 25, 29, 30, 34-37, 39 and 40 are listed on Exhibit 4 and rooms 1-6, 8, 9, 11 and 19 on Exhibit 5.

This witness testified there was a *great deal* of conversation with Mr. Wilton because "these apartments" were originally listed under the apartment form. Mr. Wilton said, according to this witness, that he had decided to break up the flats which had been occupied by only one family and he intended to make them available for five or six families by renting out rooms. He discussed the forms which he should use [R. p. 67]. This

witness said that government's Exhibits 4 and 5 were filled out *and some other forms like them.* She said "He registered them with me on or about the date they bear, September 28th, 1943." This witness denied that she told Mr. Wilton he was authorized to go ahead and charge the indicated prices. She testified:

> "He told me that he had rehabilitated these flats and got them into good condition for renting in a rooming house condition rather than as apartments as they had been, and so I then told him that we *would accept the registration.* That is what we do, and it goes into the examination department for an inspection. I have no authority other than just to simply accept the registration and then he had to wait an approval before he could receive an O. K. on that registration. He was very anxious to have it approved so that he could go ahead." [R. p. 68.] (Italics ours.)

She said she told Mr. Wilton an inspection would be had and after this he came in and she told him it had not been approved. He said he couldn't wait; that his attorney had said he could operate it that way without the registration.

On cross-examination she was certain that she did not say that Mrs. Iliff was the one to approve the registration; that she could not tell how many registrations or re-registrations were made by Mr. Wilton, nor did she know the dates. "It was over quite a period of time in the year 1943."

Kate Barney was called by the government and testified that she inspected the premises at 441 and 435 North Figueroa Street, but without seeing Exhibits 4 and 5;

that Mr. Wilton gave her the details as to the number of rooms in each apartment and the number of occupants as of March 1st, 1942, and how many were living there at the time of the inspection; that he gave her information as to whether the apartments were furnished or unfurnished and what rentals were then being charged and the amount of the utilities that were being paid either by the landlord or by the tenants [R. p. 71]. She also testified that there were no rooms which she found which were rented solely for sleeping purposes, but Mr. Wilton would state how many rooms there were in the different apartments. As an example of her work she stated that apartment 16 was listed as a three room apartment, toilet and bath, and rented for $10.00 a week with the water paid for by the landlord; that there was one occupant as of March 1st, 1942, and two on the date of inspection. [R. p. 72.]

On cross-examination the witness said "Every place I went in and saw myself, I found that Mr. Wilton's statements were verified."

On questions by the court, the witness stated that the units were separate housing units because of the bath; that the units were not so arranged that one could shut a door and occupy rooms separately so that different persons not belonging to the same family could occupy them; that she did not discuss with Mr. Wilton the requirements of a rooming house as distinguished from an apartment house. "It was right before our eyes that it was an apartment house."

At the close of the government's case, the defendant's counsel moved to dismiss the information and discharge the defendant. The motion was denied. The defendant's motion was based upon the contention that the housing accommodations rented on March 1st, 1942, were not the same as the accommodations for which the rents were charged on the respective dates on which it was alleged the charges made exceeded the maximum allowed and that a violation, if any, of the maximum rental regulation was not wilful because of the many attempts made by the defendant Wilton to comply with the requirements of the law and the assurances given to him by government employees that he was proceeding in the proper manner.

The defendant called as his first witness, R. M. Crawford, who was trustee in bankruptcy of certain companies up to December 1st, 1942. Among the assets of these companies were the properties in which the apartments were located which were the subject matter of this case. This witness testified that on account of a widening of Figueroa Street, a new front was put on the property in 1940, after which authority was given to some person to rent the building [R. p. 78]. A question as to the instructions given to such person or persons was objected to upon the ground that it was irrelevant, immaterial and hearsay. Thereupon the defendant offered to prove that the instructions were that the premises be rented for whatever could be obtained, with the view only of providing sufficient revenue to pay the costs of administering the bankruptcy.

In sustaining the objection, the court made a most unfortunate statement, prejudicial to the defendant. The court stated [R. p. 79]:

> "There is only one question involved here. The property was registered at a certain rental prior to the date. The question is whether there was more charged than that, and that is all there is in this lawsuit. The mere fact that he rented it too cheaply, he is just out of luck."

> "Well, he couldn't rent cheaply. His remedy is to apply to the board for a reclassification in the light of the conditions, but you couldn't in this case, show that the O. P. A. made a mistake in freezing this man's rent as of March 1st because the rentals were too low."

Upon urging that the evidence was relevant as to whether or not the relationship of landlord and tenant existed as between the trustee in bankruptcy and a tenant [R. p. 80], the court said, among other things:

> "I don't think you can show in this case that the rentals as of March 1st were not fair rentals and that for that reason he had a right to charge more. His remedy, he having made the original registration, or the original registration having been made during the incumbency, was to apply for relief to the administrative agency."

> "Not having done so, they couldn't go out and violate the law and then say that the rents were too low, because otherwise I would have to take the jury

> out to the premises and have them go into these apartments, and from the expressions on the faces of some of the ladies who live there, we would have to determine whether that much ought to have been charged for that sort of an apartment, which provision the law does not take care of."

Again at page 82 of the record, the court said:

> "The question is, is it a valid regulation, and was it violated, and that is all there is to this lawsuit, or to any lawsuit involving the O. P. A. We try them all . . ."

The witness Crawford stated that he had given Mr. Wilton a list of the apartments and a list of the rentals charged as of March 1st, 1942, but that he did not know of his own knowledge about any particular unit.

The purpose of the defendant's offer was to show by the trustee in bankruptcy that the apartments in question as of March 1st, 1942, had not been rented in the ordinary course of business but that persons had been permitted to occupy them for almost any amount in order to produce enough income to pay the bankruptcy administration costs. This evidence would not have changed the rent paid by any occupant as of March 1st, 1942, but it would have shown the reason for the course pursued by Mr. Wilton, as will presently be shown by Mr. Wilton's testimony.

Amid the technicalities of a new law and numerous regulations Mr. Wilton sought to make the best use of his property allowing as many occupants as possible and to obtain only a fair return thereon.

Direct Examination of Mr. Wilton.

Hugh Wilton, the defendant, took the stand on his own behalf and said he had not been connected with the premises prior to December, 1942 (except before 1938); that at the time he received the list from Mr. Crawford he checked some of the apartments; he found apartment 16 was unfurnished so far as the landlord was concerned, the furniture being claimed by the tenant (Count 1).

He said the tenants of apartment 11 identified the dining room table and three chairs as belonging to the landlord (Count 4). When the tenant moved out of apartment 11 she left two dining room chairs and possibly a rocking chair [R. p. 86]. There was some furniture in apartment 4 (Counts 6 and 7, see R. pp. 86-87].

The defendant testified:

> "At the present time seven people live in apartment No. 16, a man, wife and five children."
>
> Q. How many people are living in Apartment No. 10?"

Upon objection to this question, the following took place:

> "The Court: How many live there now, or rather, lived there on the date in question?
>
> "Mr. Taylor: On March 1, 1942?
>
> "The Court: Yes. The only dates that we are interested in are the dates set forth in the indictment. We are not interested in the now."

Thereupon the witness continued:

> "Mr. and Mrs. Mathews were all the tenants in occupancy in Apartment No. 16. Mr. and Mrs. Hoffman live in apartment No. 10. Mr. and Mrs. Yost

> and their three children live (sic) in Apartment No. 11. When Mr. and Mrs. Green lived (sic) in Apartment No. 3 there were three in the family, including one child. * * * Mr. and Mrs. Bowers and two children lived (sic) in Apartment No. 4."

This testimony does not supply the omissions under Counts 4, 5, 6, and 7 of any testimony that the rentals paid for the period referred to in the information were for the housing accommodations described in the Information. It cannot be ascertained when the parties mentioned by Mr. Wilton were living in the apartments to which he referred.

Mr. Wilton testified to a conversation on February 6th, 1943, with attorney Warren L. Shobart at the O. P. A., in which Shobart said that the intent of Congress was to house more people in units; that there was no way of getting additional housing; that he hoped he would take in children; that $10.00 would be a fair charge for the first tenant over the nominal tenancy and he would see that this was approved [R. p. 89]. This conversation was never denied.

Mr. Wilton consulted Mr. Bartlett, his attorney, and told Mr. Bartlett that Mr. Shobart had said there was no way by which new rates could be obtained upon a vacant apartment; that the apartments should be filled and then the matter taken up [R. p. 90].

Mr. Wilton said that he went down to the Office of Price Administration with the list of work done by the expenditure of $4,000 out of $7,000 in reconditioning the apartment [R. p. 91]. The witness continued by stating that he had 67 rooms and the form first given to him after he had completed the work was for 30 rooms; that

he went four or five times to see about this; that he was advised that when three-fourths of the original tenants had left the building it could be re-registered on a rooming house form [R. p. 92].

The witness said in all there were five petitions [R. p. 93] and on the fourth petition there was a change made as to certain kitchens and baths [R. p. 94]; that the health authorities had asked to have a bath accessible to all apartments on each floor, one for women and one for men and these baths were pointed out to Mrs. Burns [R. p. 94]. The details were gone over with a Mrs. Iliff of the O. P. A. Seven applications were built up [R. p. 95]. Mrs. Burns said "They have granted . . . we have granted you, Mr. Wilton, the privilege of re-registering your buildings on this form and it is effective February 15th, 1943." [R. p. 96.] Later Mrs. Burns referred to having trouble with one of the re-registration forms and then said there would be an inspection.

The inspection was made by Mrs. Barney and the nature of the inspection was described by the witness. The witness identified Exhibit A as the third registration and in the margin it shows apartments which are unfurnished and the ones which were furnished. There are 67 rooms shown on this form. Some of the apartments have three doors into the hall. Mrs. Burns wrote February 1st, 1943, as the effective day of this registration but "I got my copy about July 15th, 1943" [R. p. 101]. This exhibit was introduced in evidence and is the registration on the Hotel and Rooming House Regulation form.

The court asked:

> "Did you ever take a room from an apartment and rent it to a single person?"

The answer seemed somewhat confusing so that the court said:

> "To be regarded as a rooming house or hotel, you should be able to take a room for yourself, for one person, for the night with the usual accommodations."

The witness answered in the affirmative as to renting one room.

The comment of the court as to what rooming accommodations are to be regarded as a rooming house was not in accordance with the regulations, in that the regulations permit the arbitrary classification of housing accommodations as a rooming house when consent is obtained from the administrator [R. p. 104].

At page 104 of the record, the witness made clear that the apartments have connecting doors from one room to another so that the rooms could be separately used or used as apartment units and that there were certain rooms which could be rented separately.

The witness stated that no one ever told him a petition was necessary in connection with a reregistration but that Mrs. Burns told him after any apartments were reconditioned and refurnished they were entitled to registration on the rooming house basis because of the fact that only three-fourths of the original tenants remained. [R. p. 105.]

The witness testified as to the nature of the reconditioning upon which $7,000 had been spent after December, 1942; that the occupancy of one of the buildings increased from 12 on March 1, 1942, to 26 on the date of the filing of the Information and to 28 on the day of the trial. [R. p. 106.]

About this point the court made some very prejudicial remarks, stating that he was going to instruct the jury as a matter of law that a person could not double the number of tenants in an apartment and raise the maximum rent and turn it from an apartment into a rooming house; that by doubling the number of tenants the building remained an apartment and the price could not be raised except with the consent of the O. P. A., which the court stated had never been given in writing, thus impliedly laying down the rule that the consent could not be given other than by writing, although the law does not so provide, nor do any of the regulations.

At this point the court asked the witness whether he had ever rented to anyone by the day and the witness answered in the negative. The court then inquired as to why the application was put on the rooming house form and the witness answered that *the form was prescribed* and that *he was told to fill it in.* The questions by the court at this point [R. pp. 107-108] indicate that the court was unaware of the provision that a property could be arbitrarily classified as a rooming house.

Rent regulations for hotels and rooming houses, section 1, paragraph (e) which defines the scope of the regulation, states:

> "Where a building or establishment which does not come within the definitions of a hotel or rooming house, contains one or more furnished rooms, or where furnished housing accommodations rent on a daily, weekly or monthly basis, the landlord may, with the consent of the administrator, elect to bring all housing accommodations within such building or establishment under the control of this regulation. A

landlord who so elects shall file a registration statement under this regulation for all such housing accommodations accompanied by a written request to the administrator to consent to such election."

The last mentioned provision must be read with subdivision 3 of paragraph (b) of Section 1 of the regulation for houses which provides:

"That housing accommodations with the consent of the administrator may be brought under the control of the rent regulation for hotels and rooming houses."

In addition to the twenty-four or twenty-five original registrations, one for each rental unit, reregistrations and supplemental registrations were filed. As a new one would be filed the old one was torn up. Mrs. Burns tore up the O. P. A. copy. [R. p. 110.]

Cross-Examination of Mr. Wilton.

On cross-examination Mr. Wilton was shown Exhibit 6 as a receipt given to Mr. and Mrs. Mathews. The witness admitted his signature on the receipt but said that the receipt was for a payment which included rent, the proportionate share which the Mathews bore of the $7,000 expended for reconditioning and their share of the utility services rendered; that the same items were included in the payments referred to in Exhibits 7, 8, 9, 10 and 11.

The witness explained his conversation with Mr. Shobart, stating that he had mentioned five points on which the rent could be increased or adjusted by O. P. A., namely, the reconditioning of the property, reconditioning of the apartments, refurnishing the apartments, increase of occupancy and increase of utilities. [R. p. 115.]

In response to the court's question, Mr. Wilton said that several at O. P. A. told him he could get a classification as a rooming house and that Mr. Shobart told him to come back and apply for a reclassification as a rooming house after conditions had been changed. The witness quoted Mrs. Burns as follows [R. p. 116]:

> "Mr. Wilton, it is very unusual to get these changes, but we have been hoping to get relief in some instances where buildings are peculiarly situated in hotel sections. * * * Where are three-quarters of the tenants—if it wasn't for the fact that three-quarters of the tenants are out, you wouldn't be entitled to it, but where three-quarters of the original tenants as of March 1, 1942, are out of the building, you can go ahead with your registration."

Substantially the same thing was said by Mrs. Iliff.

It was on September 28, 1943, at about the hour of 1:15 P. M. that Mrs. Iliff told me the petition was approved and was effective February 1, 1943. She told me to post the rates in the rooms. Mrs. Burns, however, was the one I really worked with. [R. p. 121.]

Mrs. Burns said:

> "Mr. Wilton, you are operating under it (the petition) now and it is effective as of February 1st, 1943. Now it is complete and final and the examiner has to check the physical work here."

The witness had before him Exhibits 4 and 5 and it is observed from his testimony that he was referring to these exhibits under the Hotel etc. Regulation.

Recross-Examination of Mr. Wilton.

"By Mr. Tolin:

Q. Mr. Wilton, did you charge $10.00 a week on the apartment that was occupied by Mr. and Mrs. Mathews prior to the day that you filed these Exhibits No. 4 and 5, those rooming house forms?

Mr. Taylor: I feel that that is immaterial.

The Court: Well it may bear as to the intent. He has a right to show charges at or about the time or after. If the word 'wilful' weren't there, the violation would be enough. The objection is overruled.

(Testimony of Hugh Wilton.)

The Witness: Your Honor, on these apartments * * *

The Court: I am not going to let you start another argument. You will have to answer the question yes or no.

The Witness: Yes.

I charged $10.00 a week rent for the apartment occupied by the Hoffmans prior to the time I filed those Exhibits No. 4 and 5, the rooming house forms with the Area Rent Office. I charged $10.00 a week for the apartment occupied by Mr. and Mrs. Yost prior to the time I filed those same forms. I charged $10.00 a week for the apartment occupied by Mr. and Mrs. Green prior to the time I filed those forms. I charged $10.00 a week for the apartment occupied by Mr. and Mrs. Bowers prior to the time I filed those forms."

The statement by the court "If the word 'wilful' weren't there the violation would be enough" was prejudicial to the defendant and impliedly improper.

The last paragraph of Mr. Wilton's testimony as to the charge of $10.00 a week made to certain of the complaining witnesses prior to the time Exhibits 4 and 5, the rooming house forms, were filed, seems to have been im-

material, and it will be noted that the *apartments* occupied by these parties were not *identified* by this testimony.

Our examination of Exhibits 4 and 5 do not enable us to ascertain that the rooms described therein were any of the rooms occupied by the complaining witnesses. If any rooms described in Exhibit A were the rooms occupied by the complaining witnesses, the amounts paid by these witnesses were not above the maximum rentals therein provided.

Rebuttal by Government.

After the defendant had testified, the government recalled Georgia Burn, who denied any conversation with the defendant in which she stated to him that it was proper to charge the rents shown on Exhibits 4 and 5 as of February 1, 1943, although she admitted the date February 1, 1943, was in her handwriting. This witness stated:

> "I don't know exactly what I did tell him * * * I do know that he did understand that it was not up to me to make the decision * * * I told Mr. Wilton that this would have to go through the usual procedure. There was never any approval."

On cross-examination the witness admitted that she had so many applications that she could not testify positively as to everything which was said. [R. p. 127.]

The government then called Warren L. Shobart, who denied that he had told Mr. Wilton the procedure was to refurnish, recondition or rerent the apartments at an increased rent before reregistering them. This witness said he told the defendant he would have to petition on adjustment of rent and that there were eight grounds for an adjustment of rent, including a change from partly furnished to fully furnished and a major capital improvement.

On questions from the court the witness stated that he did not say to the defendant that while the apartments were vacant there was nothing on which he could pass.

The government next called Ray Fordham, who testified that in the examining section of O. P. A. he could find no petition pertaining to the property at 441 North Figueroa Street. This witness stated that when registrations were not original or were registrations involving a change from original registrations fixing the rent as of March 1, 1942, they were preceded by an application requesting the change and setting forth the grounds; that a petition is necessary for an adjustment of rent after an original registration is filed. [R. p. 130.]

On cross-examination, however, this witness testified that housing accommodations after July 1, 1943, did not require a petition to change from the wholly unfurnished to the wholly furnished; that a definite petition or consent was required to operate as a rooming house; that the first petition would be to obtain consent to operate in a different manner but

> "The maximum rates as and when that change is made would be established during the month of February, and not particularly on the 1st day of March, 1942, but regardless of the time, the petition is necessary to change the operation from an apartment accommodation to a rooming house or hotel accommodations and the change of rate would also have to be approved."

Robert L. Moore, called by the government, testified that there had been a petition filed in the enforcement section by attorney Paul Taylor but the nature of the petition was not shown.

I.

The Court Failed to Charge the Jury Correctly as to the Nature of the Crime Alleged, and as to Its Elements, and as to the Theory of the Defense.

Although the crime charged against the defendant was the violation of a regulation, the regulation was not offered in evidence. The jury was not given an opportunity of studying and considering how involved was this regulation which the defendant was forbidden to violate. By the formula instruction, this complicated matter was made more simple than it actually was, more simple than it was for the defendant. The jury was obliged to look to and take from the judge its entire knowledge of the nature of this regulation. The penalty provided is a penalty for "wilful" violation, and it is difficult to see how a regulation could be wilfully violated without a knowledge of its terms on the part of the violator, and it is difficult to see how the jury could pass upon the question of whether the defendant had sufficient knowledge of the regulation to be guilty of a wilful violation without a knowledge of the regulation itself. We, therefore, believe that there was a miscarriage of justice in this case because of the failure to give the jury a summary of the regulation in the instructions given to the jury where the regulation itself was not introduced.

As authority for the prejudicial character of the error now under discussion we cite the following cases:

In *Fischer v. United States*, 13 Fed. (2d) 756, the judgment of conviction was reversed because the charge to the jury omitted from its definition of conspiracy the element of an agreement or understanding. The charge

was a formula instruction and told the jury that if the jury believed certain named things were true beyond reasonable doubt, they constituted a conspiracy. The charge made clear that whether these things were true was to be decided by the jury on the evidence, but the element of agreement or understanding was omitted.

In *United States v. Harris*, 45 Fed. (2d) 690, the court said that where the evidence is meager, the court should be astute to see that the charge advised the jury as to all the elements of the crime.

In *Christensen v. United States*, 90 Fed. (2d) 152, the court said:

> "We think the accused was entitled to a definition of the crime and to specific instructions on the subject of criminal intention. The statute defines the offense which includes the intention which was a necessary element of the offense."

In *Connley v. United States*, 46 Fed (2d) 53, at 57, 58, it appears that a conviction was reversed because in a summation by the court certain evidence was not referred to tending to show the innocence of the accused although other evidence was referred to which pointed to his guilt.

In *Paddock v. United States*, 79 Fed. (2d) 872, conviction was reversed because of an error in the instruction concerning reasonable doubt, the court saying:

> "Belief may and should result from a preponderance of the evidence and a preponderance of the evidence is not sufficient to convict in a criminal case."

In the case at bar, the court charged the jury in formula instructions as to each count of the information, except the second which was dismissed, and these formula instructions were substantially similar in content, and constituted the only knowledge given to the jury as to the regulation the violation of which was the crime charged, except certain negative statements as to facts which would not excuse the defendant from receiving more than the maximum rental. The charge amounted to a direction to find the defendant guilty if the named facts were *believed* by the jury to be true. In every one of these vital portions of the charge *the belief* of the jury was said to be sufficient to convict. In connection with each fact necessary to constitute the crime, as stated by the court, the word "evidence" was not mentioned, but only the necessity for a belief on the part of the jury that the facts stated were true.

Where the regulation violated is not known to the jury and the jury is told to convict if the jury *believes* the defendant has done certain things, a consideration of the evidence becomes unnecessary and conviction is likely to follow.

This would seem to make the trial a jury trial in name but not in fact. If a jury, without knowing the law which the accused is charged with breaking, namely, a regulation by an administrative body, may convict on belief alone, our constitutional right to jury trial is placed in jeopardy.

In this connection we think the language of *Paddock v. United States*, 79 Fed. (2d) 872, should be given careful consideration:

> "Since a chain is no stronger than its weakest link, our constitutional rights and guaranties are no more

> secure, and we may expect no greater protection than is given to us by the court's weakest decision."

One essential fact which the court charged the jury must believe was true in order to convict was that the Area Rent Office had not made an order authorizing such a higher rental. (We pause to note that the words "Area Rent Office" are nowhere to be found in the regulation.) The court then said that it was the duty of a landlord desiring to raise a rent to petition the Area Rent Office, and to await approval before accepting any higher rent, and finished by saying that expenditures for changed conditions or increased occupants, without approval of the Office of Price Administration would not excuse a higher charge. A mistake in believing that approval had been obtained would not be a defense according to the charge because the judge expressly said:

> "If without such approval, the defendant knowingly and wilfully charged the higher rentals as alleged in any of the counts of the information, then he is guilty of the charge in the particular count of the information, even though you should be convinced that he actually made the charges or incurred the expenditures." [R. p. 142.]

The collection of a rent higher than the maximum, thus, was made a crime, if wilfully collected, even if under the most sincere belief that approval had been given. The jury may also have remembered the comment of the court as to necessity of a written consent to a raise [R. p. 107]. This limitation on the use of the word wilful as defining

the crime seems wholly unjustified. Collection of increased rent is at one's peril, if the approval of the office cannot be definitely established. Once the collection is proved, the defendant is the one required to prove beyond reasonable doubt the fact he obtained approval. This error in requiring the defendant to establish the approval, and not allowing unintentional mistake as to the approval to mitigate the wilfulness of the crime, is not to be lightly passed over. Innocent men are the ones most apt to be caught by this construction of the statute.

Where wilfulness is an essential to the commission of the crime, it must be an essential to every element of the crime.

Not only did the instructions to the jury improperly limit the defense, but they were erroneous in not dealing at all with the subject of which regulation was applicable to the housing accommodations here in question. In effect the defendant testified that he thought his property was under the Hotel and Rooming House Regulation. The Rent Regulation for Housing, section 1, paragraph b provides that the regulation shall not apply to (3) * * * housing accommodations which have been, with the consent of the Administrator, brought under the control of the Rent Regulations for Hotels and Rooming Houses. The Rent Regulation for Hotels, etc., has a corresponding provision which reads as though it was intended to give the landlord an election in certain cases. Section 1, paragraph e, entitled "Election by landlord to bring housing under this regulation," reads "where a

building or establishment which does not come within the definition of a hotel or rooming house contains one or more furnished rooms or other furnished housing accommodation rented on a *daily, weekly* or *monthly* basis, the landlord may, with the consent of the Administrator, elect to bring all housing accommodations within such building or establishment under the control of this regulation."

The regulation does not provide how the consent is to be given nor when it becomes effective nor whether it shall be in writing or not.

There is the provision that the landlord, who *so elects*, shall file a registration statement with a written request to the Administrator to consent to such election. It would, however, be a natural mistake to assume that the acceptance of the registration would be a waiver of the request. The evidence in this case conclusively shows that the defendant did file a registration statement under this Regulation for Hotels, etc. If filed, and accepted by the office how would the defendant know that the consent to come under this regulation had not been given?

There is this important difference between the two Regulations, the Regulation for Housing establishes for a rental unit only one term, whereas the Rent Regulation for Hotels, etc. establishes in section 4 separate maximum rents for different terms of occupancy (daily, weekly or monthly) and numbers of occupants of a particular room. The defendant was not accused of violating this Regulation.

The instructions of the court as to the necessity for obtaining the approval of the Office of Price Administration before changing the rentals ignored the lawful method, which was the actual method pursued by the defendant, of obtaining or attempting to obtain the consent of the administrator and filing a registration statement under the Regulation as to Hotels, etc.

The question should have been left to the jury as to which Regulation applied. Instructions to the jury as to housing to which the Regulation mentioned in the Information did not apply, was vital to a fair consideration of the case. Whether the defendant could be guilty of a wilful violation of the Housing Regulation, when attempting to comply with the other regulation was a serious question which the defendant had a right to submit to the jury.

We are not unmindful that no exceptions were taken to the instructions given to the jury in this case. We believe that this case is one for the application of the principle stated in *Williams v. United States*, 66 Fed. (2d) 868, namely, that the Appellate Court may notice plain and grievous errors which deflect the course of justice. We believe the court should take cognizance of the errors here because the legislation involved is so new, and the right to a fair charge to the jury, which is almost the same thing as a jury trial, is so important. The errors in this case were so basic as to result in the denial of a fair trial to the defendant.

II.

The Judgment of Conviction Must Be Reversed Because of the Total Insufficiency of the Evidence of Guilt.

In *Boatright v. United States,* 105 Fed. (2d) 737, it is said: "It was, of course, incumbent upon the government to prove every essential element of the offense charged."

In *Paddock v. United States,* 79 Fed. (2d) 872, the rule with respect to circumstantial evidence is stated, "This rule in brief is that the circumstances shown must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence."

In *Edwards v. United States,* 7 Fed. (2d) 357, the court said the appellate tribunal had an inherent power to consider the sufficiency of the evidence where a miscarriage of justice would result from a failure to do so, and the court weighed the presumption of a domicile remaining unchanged against the presumption of innocence, and because all circumstances shown by the evidence were as consistent with innocence as with guilt, set aside a conviction under the Selective Service Act of 1917.

We made a careful statement of the evidence in the first part of this brief, having in mind the argument now to be advanced.

Count 1. There is no evidence that the defendant received for the period charged in the information, September 28th to October 12th, 1943 the sum of $20.00 as rent for that period. Mrs. Mathews said "Our rent was paid way in the future at that time." There is no evidence what was paid for the full month of September 1943, or for the full month of October 1943. There was evidence that apartment 16 was rented unfurnished on

March 1, 1942, for $16.00 per month. There is no evidence as to the rate on March 1, 1942 for a two week's period. Mrs. Mathews testified she had her receipts and she could have proved the monthly rent paid by her, but she failed to do so. The evidence is consistent with credits and refunds sufficient to make her rent not over 16.00 per month.

Count 3. For apartment No. 10 Mr. Hoffman said he paid $10 a week for the period December 1-December 15, 1943. Madge Bentley testified the rental on this apartment was 20.00 a month on March 1, 1942, partly furnished. Except as to the number there was no evidence to show that the same housing accommodations were rented on March 1, 1942 for 20.00 a month and in December 1943 to the Hoffmans for $10.00 a week. Whether the apartments bearing this number had the same number of rooms, the same furniture or were quite different is left to conjecture.

Count 4. The rent which was more than that referred to by Madge Bentley as the maximum for apartment 11 was not paid according to Mrs. Mary Yost for apartment 11, but for apartment 14 or apartment 12. There is no evidence of what the maximum rental on these apartments was on March 1, 1942. Whether Mrs. Yost became confused as to the number of her apartment or in fact occupied an apartment other than 11 on the date charged we do not know. There is a complete failure to show as charged in count 4 that more than the maximum rent was received for apartment 11.

Count 5. There is a complete lack of evidence that more than the maximum rental was received for apartment 3, as charged in count 5. Count 5 charges the excessive rent was received from Mr. and Mrs. Green, but Mrs. Green did not mention the number of the apartment for

which she had paid rent. There is also insufficient evidence that the rent paid for the period stated in count 5 was ever received by the defendant. Mrs. Green did not know whether she paid to Mr. Wilton or to Mr. Fenkell.

Counts 6 and 7. As in the case of the testimony given by Mrs. Green, Mrs. Bowers did not mention the apartment for which she paid the rent claimed to exceed the maximum. Without knowing the apartment on which this rent was paid it is impossible to tell whether the maximum was exceeded. There is a complete failure of proof as to this count.

The proof of knowledge on the part of the defendant as to what was the maximum rent is one of the weakest links in the proof offered by the government. He did not employ the manager who testified as to the rentals on March 1, 1942. He was not residing there at the time. He received a list of the apartments from the trustee in bankruptcy, but the trustee had no personal knowledge of the accuracy and the list was not put in evidence. Mr. Wilton carefully placed at the bottom of the registration statements as to the apartments in question, Exhibits 1 and 2a, qualification to his verification, namely that to the best of his knowledge and belief the rents were as stated. These registrations were filed about January 1, 1943, but the alleged offenses were committed in December of 1943. Was this knowledge sufficiently accurate to be binding on him? It will be observed that he is not accused of violating the maximum rent stated in his registration. This evidence of the defendant's knowledge is not strong.

The judge charged that such apartment must be found by the jury to be the same housing accommodations before the jury could convict. There was no evidence to determine what changes had been made in the apartments. They were not described except by number by Madge Bentley and the description by the various tenants was meager. There was on the other hand uncontradicted testimony as to the large amount spent on the house for renovations, and there is a serious doubt as to whether there was sufficient proof of the point now under discussion.

There is a total lack of evidence that the regulation referred to in the Information was applicable to the housing accommodations described in the Information.

This question is parallel to that discussed above in connection with our contention that the court erred in not leaving to the jury, under appropriate instructions, the question of whether the applicable regulation was the rent regulation for housing or the rent regulation for hotels and rooming houses, etc.

As we have stated heretofore, an apartment house could be brought under the regulation for hotels and rooming houses with the consent of the Administrator. The Government, therefore, as a part of its case, was required to prove affirmatively and beyond reasonable doubt that no such consent had been given. There is no evidence that the Administrator did not give a consent to register the premises in question under the regulation which governed hotels and rooming houses. There was evidence introduced that no approval of the Administrator for an increase in rents was ever given under the rent regulation for housing. There was evidence that no *request* for permis-

sion to register under the regulation for hotels was made. From the fact that several registrations [See Exhibits 4 and 5, and Defendant's Exhibit A] were accepted by the Office of Price Administration, which were made under the regulation for hotels, etc., the jury could have found a *waiver* of the requirement as to the necessity for a prior request by the landlord. The evidence warranted a conclusion that the defendant understood the consent of the Administrator had been given to register under the regulation for hotels, etc. It was incumbent upon the government to establish that no such consent had been given.

It was incumbent upon the government to establish conclusively that the defendant was bound by the regulations he was accused of violating. Whatever by way of exclusion and inclusion was required to show the applicability of the regulation alleged to have been violated, should have been proved beyond reasonable doubt by the government.

The failure of the government to prove beyond reasonable doubt that the rent regulation for housing accommodations was applicable to the defendant was a fatal defect in the government's proof.

Finally we come to the question of the good faith of the defendant; whether the government proved that the violation was wilful. There were the many conferences with the O. P. A.; there were the attempts to register the apartments under the Regulation as to Hotels; there were the expenditures and changes which seemed to justify a change in rate. A preponderance of the evidence is not enough. We think the circumstances are as consistent with the innocence of the accused as with the guilt and that the government did not prove the element of wilfulness beyond reasonable doubt.

Conclusion.

On account of the lack of evidence that the apartments described in the information were rented for more than the maximum allowed, on account of the substantial evidence showing attempted compliance with the O. P. A. regulations, on account of the failure to acquaint the jury with the nature of the law violated and the failure to instruct on the necessity of convicting upon evidence rather than belief alone, we respectfully request the court to reverse the conviction of the defendant.

Respectfully submitted,

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